Alliance Connext Sdn Bhd & Anor v Wangsa Budimas Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(NCVC)(W)-2134–11 OF 2019
MOHAMAD ZABIDIN, VAZEER ALAM AND SUPANG LIAN JJCA
28 OCTOBER 2021

Contract — Lease — Breach — High Court allowed part of respondent's claim premised on breach of lease agreement — High Court dismissed appellant's claim for over payment of rental — Whether High Court judge erred in not giving proper consideration to evidence of appellants' witnesses — Whether first appellant was entitled to set off — Whether there was over payment of rental — Whether appellants' counterclaim proven — Whether High Court judge was correct in allowing claims for outstanding electricity charges and arrears in water bill — Whether there was evidence in support of claim for loss and damages to gym equipment — Whether there was document evidencing actual terms of guarantee between respondent and second appellant — Whether High Court judge was correct in dismissing respondent's claim for payment in lieu of three months' notice of termination and respondent's claim for nine months guaranteed rental income — Whether High Court judge was correct in rejecting respondent's claim for loss of rental

The respondent had rented a commercial space ('the premises') from Tropicana Development (Sabah) Sdn Bhd ('the landlord') and operated a gymnasium and fitness centre at the said premises. Subsequently, via a lease agreement ('the lease agreement'), the respondent leased the premises together with the business of the gym complete with all the gym and fitness equipment therein to the first appellant for a period of five years. The second appellant was named as the guarantor in the lease agreement but there was no separate letter of guarantee executed between the respondent and the second appellant. The first appellant then subleased the premises together with the gym equipment as a going business to a third party. The first appellant stated that the respondent had knowledge about the sublease, but the respondent denied knowledge. The respondent subsequently exercised its right to re-enter the premises pursuant to cl 5(a) of the lease agreement and terminated the lease agreement for reasons of the first appellant's breaches of the lease agreement. The respondent then filed an action in the High Court to claim damages for breach of contract arising from a lease agreement, and the appellants counterclaimed for over payment of rental. At the end of the case, the High Court allowed part of the respondent's claim and dismissed the appellants' counterclaim, hence, the present appeal. The issues raised by the appellants were in relation to: (a) the High Court's rejection of the defence witnesses' testimonies on the basis that they were not

authorised to testify on behalf of the first appellant; (b) the allowing of the respondent's claim in part against the first appellant, that was the sum of RM56,884.20 as rental arrears, RM18,534.81 for outstanding electricity charges, RM2,632.96 for outstanding water bill, and RM588,378.91 as costs of the damage and loss to gym equipment; (c) the allowing of the claim in the sum of RM56,884.20 (rental arrears) against the second appellant on the basis that the second appellant had guaranteed payment of the monthly rental by the first appellant based on cl 5(l) of the lease agreement; and (d) the High Court's dismissal of the first appellant's counterclaim. The respondent raised the following issues in the cross-appeal: (i) the High Court's rejection of the respondent's claim for the sum of RM138,180 being the payment in lieu of the three months' notice of termination; (ii) the High Court's rejection of the respondent's claim for the sum of RM414,540 being the nine months guaranteed rental income stipulated in the lease agreement; and (iii) the High Court's rejection of the respondent's claim in the sum of RM1,519,998 for loss of rentals for the remaining period of the lease from 1 November 2017 to 31 July 2020.

Held, allowing the appellants' appeal in part, dismissing the respondent's cross-appeal and varying the order of the High Court with no order as to costs:

(1) The High Court judge had erred in not giving proper consideration to the evidence of the appellants' witnesses by misapplying the law. There was no requirement in law that a witness called by a company must be current officers of the company or must be expressly authorised by an officer of the company for that person to appear as its witness in court. In that regard, there could not be any challenge to a witness called by a company to produce the authorisation. Further, all three witnesses of the first appellant had direct knowledge of the matters in dispute and were relevant and competent witnesses. They were principally witnesses of the court, whose testimony if relevant and admissible would assist the court in making its determination of the issues. In this regard, the court ought to be reminded of the well-established principle that 'there is no property in a witness'. Therefore, the rejection of the evidence of these defence witnesses was a grave error on the part of the High Court judge that warranted appellate intervention (see paras 13 & 21–22).

(2) The uncontroverted evidence and in fact the documentary evidence adduced by the respondent showed that the first appellant was entitled to the set off of RM68,634 (being the first appellant's entitlement to 70% reduction in rental due to the reduction of rental of the premises by the landlord) against the sum of RM56,884.20 claimed as rental arrears. Thus, the High Court judge had failed to properly evaluate the evidence when he allowed the respondent's claim for the sum RM56,884.20 as rental arrears. By reason of this valid set off there were in fact no rental arrears due and payable to the respondent by the first appellant. Had

there been proper judicial appreciation of the evidence, this would have been quite apparent. Thus, the court found that this was a proper case for appellate intervention to set aside this part of the judgment. Further, based on the above finding, there was overwhelming evidence establishing the first appellant's counterclaim. After the set off, the first appellant was entitled to the remaining amount of RM11,749.80 (see paras 25, 27 & 42–43).

(3) As for the sum of RM18,534.81 for outstanding electricity charges and RM2,632.96 as arrears in the water bill that was allowed by the High Court, there was ample evidence to support this claim by the respondent. There was documentary evidence in the form of outstanding bills from the respective utilities companies that remained unpaid for the period where the first appellant was in occupation of the premises. Hence, the court found no reason to interfere with this part of the judgment of the High Court (see para 28).

(4) The only evidence adduced in support of the respondent's claim for loss and damages to the gym equipment was the Condition Report/Fixed Assets List. However, PW1 did not give the name of the maker of the said document. Neither did PW1 had direct knowledge of the contents of the Condition Report. In the circumstance, the court agreed with the appellants that the evidence of PW1 based on the Condition Report was hearsay and inadmissible. The High Court judge failed to give proper and due consideration to this important issue of admissibility. It was trite law that the respondent bore the burden of proof to establish the damages that it said that it had suffered. In the present case, the respondent had failed to discharge that burden on the balance of probabilities. Therefore, the pronouncement of the High Court judge that the respondent had established this claim was misconceived in law. Consequently, the court allowed this part of the appeal by the first appellant and set aside the award of the sum of RM588,378.91 (see paras 30 & 32–35).

(5) There was no document evidencing the actual terms of the guarantee between the respondent and the second appellant. In addition, the court had decided that there were no arrears in the monthly rental due and payable. There was therefore no breach of the lease agreement by the first appellant, as such, liability under cl 5(l) did not arise, and had not been established. In the circumstance, cl 5(l) was inoperative against the second appellant. Considering this, the High Court judge had erred in law and in fact by ordering the second appellant to pay the sum of RM56,884.20 to the respondent. Hence, the court allowed the appeal against this part of the judgment and set aside the High Court's order in that respect (see paras 40–41).

(6) The respondent relied upon cl 5(k) of the lease agreement to claim for the payment in lieu of the three months' notice of termination and the nine

months guaranteed rental income. The court rejected both these heads of claims because for cl 5(k) of the lease agreement to apply there must be premature termination by the first appellant, but in the present case, the lease agreement was terminated by the respondent, as such, cl 5(k) did not come into play. In addition, the landlord had also terminated the tenancy agreement, which meant that even if the lease agreement were still valid and subsisting, it too would have come to an automatic end. Hence, the respondent could not have suffered any damages as claimed for any period after the termination of tenancy agreement by the landlord. To that extent, the court agreed with the High Court judge that to allow these two heads of claim would amount to unreasonable and unwarranted compensation being awarded to the respondent (see paras 45–47).

(7) In relation to the claim for the loss of rental in the sum of RM1,519,998, the uncontroverted evidence showed that the respondent's tenancy agreement with the landlord was terminated by the landlord as of 16 November 2017 for reasons of non-payment of monthly rentals. Following the termination, the respondent was no longer in possession of the premises. Hence, the High Court judge was entirely correct in rejecting this claim as the respondent no longer had legal possession of the premises to rent it out to the first appellant, and to have suffered the loss of rental income for the remaining period of the lease agreement from 1 November 2017 to 31 July 2020 (see para 48).

[Bahasa Malaysia summary

Responden telah menyewa sebuah premis komersial ('premis tersebut') daripada Tropicana Development (Sabah) Sdn Bhd ('tuan tanah') dan membuka gimnasium dan pusat kecergasan di premis tersebut. Selepas itu, melalui perjanjian pajakan ('perjanjian pajakan tersebut'), responden memajakkan premis tersebut bersama-sama perniagaan gim yang lengkap dengan semua peralatan gim dan kecergasan di dalamnya kepada perayu pertama untuk tempoh lima tahun. Perayu kedua dinamakan sebagai penjamin dalam perjanjian pajakan tersebut tetapi tiada surat jaminan berasingan yang ditandatangani antara responden dan perayu kedua. Perayu pertama kemudiannya memajakkan atas pajakan premis tersebut bersama-sama dengan peralatan gim tersebut sebagai perniagaan yang beroperasi kepada pihak ketiga. Perayu pertama menyatakan bahawa responden mempunyai pengetahuan tentang subpajakan tersebut, tetapi responden menafikan pengetahuannya. Responden kemudiannya menggunakan haknya untuk memasuki semula premis tersebut menurut klausa 5(a) perjanjian pajakan dan menamatkan perjanjian pajakan atas sebab perayu pertama melanggar perjanjian pajakan tersebut. Responden kemudiannya memfailkan tindakan di Mahkamah Tinggi untuk menuntut ganti rugi kerana kemungkiran kontrak yang timbul daripada perjanjian

pajakan tersebut, dan perayu menuntut balas atas bayaran sewa yang berlebihan. Pada akhir kes, Mahkamah Tinggi membenarkan sebahagian daripada tuntutan responden dan menolak tuntutan balas perayu, justeru, rayuan semasa. Isu-isu yang dibangkitkan oleh perayu-perayu adalah berhubung dengan: (a) penolakan Mahkamah Tinggi terhadap keterangan saksi-saksi pembelaan atas dasar bahawa mereka tidak diberi kuasa untuk memberi keterangan bagi pihak perayu pertama; (b) pembenaran sebahagian tuntutan responden terhadap perayu pertama, iaitu sejumlah RM56,884.20 untuk tunggakan sewa, RM18,534.81 untuk bayaran elektrik tertunggak, RM2,632.96 untuk bil air tertunggak, dan RM588,378.91 sebagai kos kerosakan dan kehilangan peralatan gim; (c) pembenaran tuntutan dalam jumlah RM56,884.20 (tunggakan sewa) terhadap perayu kedua atas dasar perayu kedua telah menjamin pembayaran sewa bulanan oleh perayu pertama berdasarkan klausa 5(l) perjanjian pajakan tersebut; dan (d) Mahkamah Tinggi menolak tuntutan balas perayu pertama. Responden membangkitkan isu-isu berikut dalam rayuan balas: (i) penolakan Mahkamah Tinggi terhadap tuntutan responden untuk jumlah RM138,180 sebagai bayaran ganti kepada notis penamatan tiga bulan; (ii) penolakan Mahkamah Tinggi terhadap tuntutan responden untuk jumlah RM414,540 sebagai pendapatan sewaan selama sembilan bulan yang dijamin seperti mana yang ditetapkan dalam perjanjian pajakan tersebut; dan (iii) penolakan Mahkamah Tinggi terhadap tuntutan responden berjumlah RM1,519,998 untuk kehilangan sewa bagi baki tempoh pajakan dari 1 November 2017 hingga 31 Julai 2020.

Diputuskan, membenarkan sebahagian rayuan perayu-perayu, menolak rayuan silang responden dan mengubah perintah Mahkamah Tinggi tanpa perintah berkenaan kos:

(1) Hakim Mahkamah Tinggi telah terkhilaf kerana tidak memberikan pertimbangan sewajarnya kepada keterangan saksi-saksi perayu dengan menyalahgunakan undang-undang. Tiada keperluan dalam undang-undang bahawa saksi yang dipanggil oleh syarikat mestilah pegawai semasa syarikat tersebut atau mesti diberi kuasa secara nyata oleh pegawai syarikat untuk individu tersebut hadir sebagai saksinya di mahkamah. Sehubungan itu, tidak boleh ada cabaran terhadap saksi yang dipanggil oleh syarikat untuk mengemukakan kebenaran. Seterusnya, ketiga-tiga saksi perayu pertama mempunyai pengetahuan langsung tentang perkara yang dipertikaikan dan merupakan saksi-saksi yang relevan dan berwibawa. Mereka pada dasarnya adalah saksi-saksi mahkamah, yang keterangannya jika relevan dan boleh diterima akan membantu mahkamah dalam membuat penentuan isu-isu tersebut. Dalam hal ini, mahkamah harus diingatkan tentang prinsip yang telah ditetapkan iaitu 'there is no property in a witness'. Oleh itu, penolakan keterangan saksi-saksi pembelaan ini adalah satu kekhilafan besar hakim

Mahkamah Tinggi yang memerlukan campur tangan rayuan (lihat perenggan 13 & 21–22).

(2) Keterangan yang tidak dipertikaikan dan juga keterangan dokumentari yang dikemukakan oleh responden menunjukkan bahawa perayu pertama berhak mendapat penolakan sebanyak RM68,634 (iaitu hak perayu pertama terhadap pengurangan sewa sebanyak 70% disebabkan oleh pengurangan sewa premis oleh tuan tanah) terhadap jumlah RM56,884.20 yang dituntut sebagai tunggakan sewa. Oleh itu, hakim Mahkamah Tinggi telah gagal menilai dengan betul keterangan apabila membenarkan tuntutan responden untuk jumlah RM56,884.20 sebagai tunggakan sewa. Disebabkan oleh penolakan yang sah ini, sebenarnya tiada sewa yang tertunggak dan perlu dibayar kepada responden oleh perayu pertama. Sekiranya terdapat penghayatan kehakiman yang sewajarnya terhadap keterangan, perkara ini akan menjadi agak jelas. Oleh itu, mahkamah mendapati bahawa ini adalah kes yang sesuai untuk campur tangan rayuan bagi mengenepikan bahagian penghakiman ini. Selanjutnya, berdasarkan dapatan di atas, terdapat banyak keterangan yang membuktikan tuntutan balas perayu pertama. Selepas penolakan, perayu pertama berhak mendapat baki bayaran sebanyak RM11,749.80 (lihat perenggan 25, 27 & 42–43).

(3) Bagi jumlah RM18,534.81 sebagai caj elektrik tertunggak dan RM2,632.96 sebagai tunggakan bil air yang dibenarkan oleh Mahkamah Tinggi, terdapat keterangan yang mencukupi untuk menyokong tuntutan ini oleh responden. Terdapat keterangan dokumentari dalam bentuk bil tertunggak daripada syarikat utiliti masing-masing yang masih belum dibayar untuk tempoh perayu pertama menduduki premis tersebut. Oleh itu, mahkamah mendapati tiada sebab untuk campur tangan ke atas perkara ini dalam penghakiman Mahkamah Tinggi (lihat perenggan 28).

(4) Satu-satunya keterangan yang dikemukakan bagi menyokong tuntutan responden untuk kehilangan dan kerosakan peralatan gim ialah Laporan Keadaan/Senarai Aset Tetap. Bagaimanapun, PW1 tidak memberikan nama pembuat dokumen tersebut. PW1 juga tidak mempunyai pengetahuan langsung tentang kandungan Laporan Keadaan tersebut. Dalam keadaan itu, mahkamah bersetuju dengan perayu bahawa keterangan PW1 berdasarkan Laporan Keadaan adalah keterangan dengar cakap dan tidak boleh diterima. Hakim Mahkamah Tinggi gagal memberikan pertimbangan yang betul dan sewajarnya kepada isu penting berkenaan kebolehterimaan ini. Sudah menjadi undang-undang yang mantap bahawa responden menanggung beban pembuktian untuk membuktikan ganti rugi yang dikatakan telah dialaminya. Dalam kes ini, responden telah gagal untuk melepaskan beban tersebut atas imbangan kebarangkalian. Oleh itu, pernyataan hakim Mahkamah Tinggi bahawa

responden telah membuktikan tuntutan ini adalah salah tanggap di sisi undang-undang. Akibatnya, mahkamah membenarkan bahagian rayuan ini oleh perayu pertama dan mengenepikan award berjumlah RM588,378.91 (lihat perenggan 30 & 32–35). A

(5) Tiada dokumen yang membuktikan terma sebenar jaminan antara responden dan perayu kedua. Di samping itu, mahkamah telah memutuskan bahawa tiada tunggakan dalam sewa bulanan yang perlu dibayar. Oleh yang demikian, tiada pelanggaran perjanjian pajakan oleh perayu pertama, kesannya, liabiliti di bawah klausa 5(l) tidak timbul, dan tidak dibuktikan. Dalam keadaan tersebut, klausa 5(l) tidak berkuat kuasa terhadap perayu kedua. Berdasarkan dapatan ini, hakim Mahkamah Tinggi telah terkhilaf dari segi undang-undang dan fakta apabila mengarahkan perayu kedua membayar sejumlah RM56,884.20 kepada responden. Oleh itu, mahkamah membenarkan rayuan terhadap bahagian penghakiman ini dan mengenepikan perintah Mahkamah Tinggi dalam perkara tersebut (lihat perenggan 40–41). B C D

(6) Responden bergantung pada klausa 5(k) perjanjian pajakan tersebut untuk menuntut bayaran sebagai ganti notis penamatan tiga bulan dan pendapatan sewa yang dijamin selama sembilan bulan. Mahkamah menolak kedua-dua tuntutan ini kerana klausa 5(k) perjanjian pajakan tersebut hanya akan terpakai jika terdapat penamatan pramatang oleh perayu pertama, tetapi dalam kes ini, perjanjian pajakan telah ditamatkan oleh responden, oleh itu, klausa 5(k) tidak terpakai. Di samping itu, tuan tanah juga telah menamatkan perjanjian penyewaan, yang bermaksud bahawa walaupun perjanjian pajakan masih sah dan wujud, ia juga akan berakhir secara automatik. Oleh itu, tidak mungkin responden akan mengalami apa-apa kerugian seperti yang didakwa bagi apa-apa tempoh selepas penamatan perjanjian penyewaan oleh tuan tanah. Setakat itu, mahkamah bersetuju dengan hakim Mahkamah Tinggi bahawa untuk membenarkan kedua-dua tuntutan ini akan berjumlah kepada pampasan yang tidak munasabah dan tidak wajar diberikan kepada responden (lihat perenggan 45–47). E F G

(7) Berhubung dengan tuntutan kehilangan sewa berjumlah RM1,519,998, keterangan yang tidak dipertikaikan menunjukkan bahawa perjanjian penyewaan responden dengan tuan tanah telah ditamatkan oleh tuan tanah pada 16 November 2017 atas sebab kegagalan membayar sewa bulanan. Berikutan penamatan tersebut, responden tidak lagi memiliki premis tersebut. Oleh itu, hakim Mahkamah Tinggi adalah betul sepenuhnya dalam menolak tuntutan ini kerana responden tidak lagi mempunyai pemilikan sah ke atas premis untuk menyewakannya kepada perayu pertama, dan untuk mengalami kehilangan pendapatan sewaan bagi baki tempoh perjanjian pajakan dari 1 November 2017 hingga 31 Julai 2020 (lihat perenggan 48).] H I

Cases referred to

Hong Yik Trading v Liziz Plantation Sdn Bhd [2017] 5 MLJ 398; [2017] 8 CLJ 491, FC (refd)

Husdi v Public Prosecutor [1979] 2 MLJ 304; [1979] 1 LNS 33 (refd)

Kotabato Corp (M) Sdn Bhd & Anor v Wisma Central Management Corp [2003] 4 MLJ 473; [2003] 4 CLJ 520, CA (refd)

Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635, HC (refd)

Ranbaxy (M) Sdn Bhd v EI Du Pont Nemours and Coo [2012] 4 MLJ 34; [2012] 9 CLJ 79, CA (refd)

Sarawak Building Supplies Sdn Bhd v Director of Forests & Ors [1991] 1 MLJ 211; [1991] 3 CLJ Rep 706, HC (refd)

Suruhanjaya Sekuriti v Datuk Ishak bin Ismail [2016] 1 MLJ 733; [2016] 3 CLJ 19, FC (refd)

Tong Soon Tiong & Ors v FA Securities Sdn Bhd [2016] 6 MLJevi 165; [2013] 2 CLJ 448, FC (refd)

Legislation referred to

Companies Act 2016 s 616
Evidence Act 1950 s 101
Rules of Court 2012 O 5 r 6

Appeal from: Suit No BKI-22NCvC-2/1 of 2018 (HC2) (High Court, Kota Kinabalu)

Baldev Singh (Kelvin Wong with him) (Baldev Gan & Assoc) for the appellants. Ronny Cham (Ronny Cham & Co) for the respondent.

Vazeer Alam JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal from the decision of the High Court in Kota Kinabalu, Sabah. The plaintiff/respondent claimed damages for breach of contract arising from a lease agreement, and the defendants/appellants counterclaimed for over payment of rental. The High Court, after full trial, allowed part of the respondent's claim and dismissed the appellants' counterclaim. The appellants appealed against the whole of the judgment, and the respondent filed a cross-appeal in respect of the portions of the claim that were dismissed by the High Court. We had heard both the appeal and cross-appeal and this is our unanimous judgment.

BACKGROUND FACTS

[2] The plaintiff/respondent had via a tenancy agreement dated 30 January 2015 ('tenancy agreement') rented a commercial space ('the demised premises') in a building known as Bangunan Blue Seven from Tropicana Development (Sabah) Sdn Bhd ('the landlord') and operated a gymnasium and fitness centre called 'All Fit' ('the gym').

[3] The respondent subsequently through a lease agreement dated 1 August 2015 together with additional terms contained in an attached letter of understanding ('LOU') (collectively referred to as the 'lease agreement') leased the demised premises together with the business of the gym complete with all the gym and fitness equipment therein to the first defendant/first appellant for a period of five years. In the lease agreement the second appellant was named as guarantor in respect of the rental payments payable by the first appellant to the respondent. However, no separate letter of guarantee was executed between the respondent and the second appellant spelling out the terms of the guarantee.

[4] Sometime since October 2016 the first appellant had subleased the demised premises together with the gym equipment as a going business concern to a third party known as Platinum Fitness Sdn Bhd ('Platinum'). The first appellant states that the fact of the sublease to Platinum was known to the respondent and in fact from October 2016 it was Platinum that had paid the monthly rental due under the lease agreement directly to the respondent. However, the respondent denies knowledge of the sublease to Platinum and contends that it was done without its consent.

[5] On or about 21 October 2017, the respondent re-entered the demised premises and took possession of the demised premises together with all the gym and fitness equipment allegedly for breaches of the lease agreement by the first appellant. Thereafter, via solicitor's letter dated 6 November 2017 the respondent confirmed the respondent's exercise of its right of re-entry onto the demised premises citing the terms of cl 5(a) of the lease agreement. The respondent's solicitor further confirmed that the respondent had terminated the lease agreement for reasons of the first appellant's breaches of the lease agreement without specifying what the breaches were.

[6] The respondent then commenced this action for breach of contract, claiming the following relief:

(a) rental arrears for September 2017 (RM7,922.80) and October 2017 (RM48,961.40) totalling RM56,884.20;

(b) payment of three months rental in lieu of notice of termination (RM138,180);

(c) nine months of guaranteed rental income (RM414,540);

(d) outstanding electricity bill (RM18,534.81);

(e) outstanding water bill (RM2,632);

(f) loss and damage to the gym equipment (RM588,378.91);

(g) loss of rentals for the remaining period of the lease agreement from 1 November 2017 to 31 July 2020 (RM1,519,998);

(h) in the alternative, damages to be assessed by the court; and

(i) statutory interest of 5%pa from date of judgment to date of full payment.

[7] The claim against the second appellant was on the basis of the second appellant having stood as guarantor per cl 5(l) of the lease agreement that stated: 'The monthly rental during the term of the said lease and the guaranteed rental income as agreed under this agreement are personally guaranteed by Mr Nicholas Ng Fui Ming (NRIC No 811119–12–5249)'.

[8] The appellants in their defence and counterclaim contended that the respondent was not entitled to any relief because rentals were paid in full and that there was in fact over-payment of rental. The first defendant stated that it was a term of the lease agreement that if the landlord were to reduce the monthly rental for the demised premises under the tenancy agreement, then the first appellant shall be entitled to benefit 70% of that reduction. The first appellant stated that there was in fact a reduction of the monthly rental by the landlord. However, the 70% benefit of that reduction was never passed on to the first appellant. The first appellant had been paying the full rental without the benefit of the 70% reduction, and the amount of refund that the first appellant was entitled thereto for over payment had by then far exceeded any arrears of monthly rental for September and October 2017 that the respondent was claiming. The first defendant thus counterclaimed for this amount. In addition to that the second appellant denied that he had ever given his personal guarantee as alleged, nor that he ever signed any personal guarantee as claimed by the respondent.

THE HIGH COURT'S DECISION

[9] The High Court dismissed the first appellant's counterclaim and allowed part of the respondent's claim and entered judgment for the following heads of claim against the first appellant:

(a) rental arrears of RM56,884.20;

(b) outstanding electricity bill of RM18,534.81;

(c) outstanding water bill of RM2,632.96; and

(d) damage and loss to gym equipment of RM588,378.91.

The court also entered judgment against the second appellant for the sum of RM56,884.20 on account of the guarantee for payment of outstanding rentals for September and October 2017 per cl 5(l) of the lease agreement. The remainder of the respondent's claim was not allowed.

THE ISSUES IN THIS APPEAL

[10] There were several issues raised by the appellants in this appeal and they may be summarised as follows:

(a) the court's rejection of the defence witnesses' testimonies on the basis that they were not authorised to testify on the first appellant's behalf;

(b) the allowing of the respondent's claim in part against the first appellant, that is the sum of RM56,884.20 as rental arrears, RM18,534.81 for outstanding electricity charges, RM2,632.96 for outstanding water bill, and RM588,378.91 as costs of the damage and loss to gym equipment;

(c) the allowing of the claim in the sum of RM56,884.20 (rental arrears) against the second appellant on the basis that the second appellant had guaranteed payment of the monthly rental by the first appellant; and

(d) the High Court's dismissal of the first appellant's counterclaim.

[11] The respondent's issues in the cross-appeal were:

(a) the High Court's rejection of the respondent's claim for the sum of RM138,180 being the payment in lieu of the three months' notice of termination;

(b) the High Court's rejection of the respondent's claim for the sum of RM414,540 being the nine months guaranteed rental income stipulated in the lease agreement; and

(c) the High Court's rejection of the respondent's claim in the sum of RM1,519,998 for loss of rentals for the remaining period of the lease from 1 November 2017 to 31 July 2020.

THE APPELLANT'S FIRST ISSUE

[12] The learned High Court judge had rejected and/or refused to consider the testimony of DW1, DW2 and DW3 on grounds that when they testified in court they were neither shareholders or directors of the first appellant company nor were they authorised by the company to testify on its behalf. In this regard, the learned judge said in his grounds of judgment:

> Firstly, I shall deal with the issue raised by the plaintiff that the first defendant did not offer any evidence or call any witnesses to rebut or challenge the plaintiff's claim. In this case, although the defendants had called three witnesses to testify on their behalf, it was pointed out that the first defendant being a company was not represented by any authorised person of the company to appear and give evidence on its behalf. It was pointed out that Mr Nicholas Ng Fui Ming was called as DW1 and tendered DWS1 was the second defendant in this case. It was submitted that based on the evidence he had resigned as a Director and disposed of his shares in the first defendant as from 15 July 2016. Mr Tan Kui Siong who was called as DW2, is a Director of Platinum Fitness Sdn Bhd. Mr Thein Kim Hung who was called as DW3 was a Director of the first Defendant ie before 27 July 2016.
>
> Based on the above facts, the arguments raised by the plaintiff that requires the determination of this court is that whether the evidence of DW1 and DW3 can be relied by this court as the evidence of the first defendant.

The learned trial judge then applied the dicta in the case of *Sarawak Building Supplies Sdn Bhd v Director of Forests & Ors* [1991] 1 MLJ 211; [1991] 3 CLJ Rep 706 relied upon by counsel for the respondent and held as follows:

> In respect of this issue, after having considered the authorities in *Sarawak Building Supplies*, I am of the view that there are merits in the Plaintiff's submission. Although the facts in the said case are distinguishable, the principles laid down in the said case is applicable to the present case. It is to be noted at the time of this hearing, DW1 and DW3 were no longer the Directors of the first defendant. When the plaintiff raised the challenge that they have no authority to act and offer evidence on behalf of the first defendant, the onus lies on the first defendant to show otherwise and a witness who is authorised by the first defendant should come forward to state its position and rebut the plaintiff's claim. The evidence of DW1 and DW3 in my view are just supportive evidence to support the first defendant's case but the principal or main witness to defend the claim must be somebody that is authorised by the first defendant's company. In this case despite the challenge, the first defendant did not offer any reasons to show why it could of call somebody from the first defendant to take the witness stand.

[13] With all due respect, we find that the learned trial judged had erred in not giving proper consideration to the evidence of the appellants' witnesses by misapplying the law. Firstly, there is no requirement in law that a witness called by a company must be current officers of the company or must be expressly authorised by an officer of the company for that person to appear as its witness in court. In that regard, there cannot be any challenge to a witness called by a company to produce the authorisation.

[14] The case of *Sarawak Building Supplies Sdn Bhd v Director of Forests & Ors* [1991] 1 MLJ 211; [1991] 3 CLJ Rep 706 relied on by the learned trial judge concerned a challenge to the authority of a solicitor or counsel acting for a company and had nothing to do with competency of a witness to testify on a company's behalf. The dicta of that case deals with the representative capacity

of a solicitor or counsel to act for a company. This is clearly seen from the judgment of Haidar J (as he then was) in that case where he held that:

> As regards litigation by an incorporated company, as a rule the directors are the persons who have authority to act for the company, but in the absence of any contract to the contrary in the articles of association, the majority of the members are entitled to decide, even to the extent of overruling the directors, whether an action in the company's name should be begun or allowed to proceed. The secretary of a company cannot institute proceedings in its name in the absence of express authority to do so; but proceedings begun without authority may subsequently be ratified.
>
> *The lack of authority of the solicitors to act can be challenged at any stage of the proceedings. Once the challenge has been made, the burden of proving that the suit had been instituted with proper authority rests on the plaintiff company* (see *Syawal Enterprise Sdn Bhd & Anor v Dayadiri Sdn Bhd* [1990] 3 MLJ 239; [1990] 3 CLJ 165). (Emphasis added.)

[15] It is trite law that the first appellant being a company, cannot appear in court by its officers or directors and may ordinarily appear only by counsel instructed on its behalf. This requirement is found in O 5 r 6 of the Rules of Court 2012 read together with s 616 of the Companies Act 2016. See: *Kotabato Corp (M) Sdn Bhd & Anor v Wisma Central Management Corp* [2003] 4 MLJ 473; [2003] 4 CLJ 520 (CA). It is in that context that the dicta of Haidar J in *Sarawak Building Supplies Sdn Bhd v Director of Forests & Ors* must be taken. The first appellant had adhered to this requirement of the law, and indeed there was no challenge to counsel's authority to represent the first appellant in proceedings. The challenge was instead to the competency of the first appellant company's witnesses. When learned counsel for the respondent, Mr Ronny Cham, was queried by this court if he had any statutory or case authority for his proposition that only current officers of a company or a person expressly authorised by the company can appear as a competent witness for and on behalf of a company, he answered in the negative. Mr Ronny Cham reiterated that he was merely relying on *Sarawak Building Supplies Sdn Bhd v Director of Forests & Ors* for that proposition, which we must point out is an entirely misplaced and erroneous reliance.

[16] Learned counsel for the appellants on the other hand referred to a decision of this court in *Ranbaxy (M) Sdn Bhd v EI Du Pont Nemours and Coo* [2012] 4 MLJ 34; [2012] 9 CLJ 79 (CA), which was more on point. The issue in *Ranbaxy* was whether a party to a civil proceeding must personally attend court and give evidence. Ramly Ali JCA (as he then was) held:

> [67] The appellant's complaints relating to grounds 3–6 of the memorandum of appeal, in essence can be summarised as follows:
>
> (a) *there was no representative from the respondent company in court; and the respondent was not physically present to give testimony before the learned judge*;

A ...

[68] The present case is a civil case, where the court decides based on the evidence adduced during trial on the balance of probabilities. Under s 101 of the Evidence Act 1950 the person who asserts the existence of any fact must prove the fact exists. Section 102 of the same Act stipulates that the burden of proof in a suit or
B proceeding lies on that person who would fail if no evidence at all were given on either side. What the respondent needs to do (as the defendant to the present claim) is to enter appearance within time and to be represented by counsel to handle the proceeding on its behalf; to file the necessary statement of defence and counter claim as well as other follow-up documents to get the matter ready for trial. All these
C had been duly done by the respondent.

[69] *For the purpose of trial, the respondent needs to adduce evidence, either by calling its witnesses to testify in court and to tender documentary evidence in order to prove its defence and counterclaim.* In this case the respondent had called seven witnesses to testify on its behalf.

D [70] *Section 118 of the Evidence Act 1950 provides that all persons shall be competent to testify* unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender age, extreme old age, disease or any other cause of the same kind. Section 120(1) of the Evidence Act 1950 states that in all civil proceedings the parties to the suit shall
E be competent witnesses. Thus, a party to a suit may be competent to give evidence but he may not be compelled to do so. Section 134 of the Evidence Act 1950, makes it clear that no particular number of witnesses shall in any case be required for the proof of any fact. The evidence of every witness is to be judged on its own merits.

[71] *There is no law to say that a party to a civil proceeding must personally attend court*
F *and give evidence to support its claim or counterclaim. The respondent may, at its own discretion call any number of witnesses whose evidence are relevant to prove its defence and counter claim.* (Emphasis added.)

[17] The above pronouncement by this court in *Ranbaxy* was referred to
G with approval by the Federal Court in *Tong Soon Tiong & Ors v FA Securities Sdn Bhd* [2016] 6 MLJevi 165; [2013] 2 CLJ 448, where in considering whether an undischarged bankrupt was a competent witness, Suriyadi Halim Omar FCJ had this to say:

[19] Section 118 of the Evidence Act 1950 is a specific provision that deals with
H issues of witnesses and highly relevant in shedding some light on the matter at hand. It reads:

> All persons shall be competent to testify unless the court considers that they are prevented from understanding the question put to them or from giving rational answers to those questions by tender years, extreme old age, disease, whether of
I body or mind, or any other cause of the same kind.

[20] The above provision refers to categories of witnesses who may be disqualified from giving evidence by reason of tender age, extreme old age, incapacitated by diseases whether of body or mind, or any other cause of the same kind. The sole test of competence under this section is his intellectual capacity ie, his understanding

(Evidence Practice and Procedure by Augustine Paul (3rd Ed) p 915; *Sidek Ludan v Public Prosecutor* [1995] 3 MLJ 178; [1995] 1 LNS 219). Under the illustration of Explanation a mentally disordered person or lunatic is not incompetent to testify unless he is prevented by his condition from understanding the questions put to him and giving direct rational answers to them. Even a dumb witness is a competent witness if he can give evidence in an intelligent manner eg, by writing or by signs (*Chai Kor v Public Prosecutor* [1965] 2 MLJ 208; [1965] 1 LNS 16). But eventually the court must ascertain their competency (*Kee Lik Tian v Public Prosecutor* [1984] 1 MLJ 306; [1984] 1 LNS 55).

[21] In *Ranbaxy (M) Sdn Bhd v EI Du Pont Nemours and Coo* [2012] 4 MLJ 34; [2012] 9 CLJ 79 the Court of Appeal said:

> Section 118 of the Evidence Act 1950 provides that all persons shall be competent to testify unless the court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions by tender age, extreme old age, disease or any other cause of the same kind. Section 120(1) of the Evidence Act 1950 states that in all civil proceedings the parties to the suit shall be competent witnesses ...

[22] For completeness of argument, even though the sixth plaintiff ie, the bankrupt was an interested witness in a certain sense, suffice for us to say that if his testimony was tainted then some form of corroboration was required in order for the court to act on it. It must be borne in mind that there is no legal presumption that the evidence of an interested witness is to be disbelieved. Eventually everything falls back on the court to decide whether his evidence is to be accepted or not (*Liow Siow Long v Public Prosecutor* [1970] 1 MLJ 40; [1969] 1 LNS 98; *Rattan Singh v Public Prosecutor* [1971] 1 MLJ 162; [1970] 1 LNS 132).

[23] Within the context of s 118 of the Evidence Act 1950 a bankrupt, unless falling within the above legislated restricted categories, surely cannot per se be equated with lack of intellectual capacity to understand. And neither is bankruptcy a disease. To wind it up, under the Evidence Act 1950 a debtor's status as a bankrupt is not a disability that will dilute his competency to testify, especially if all the rules of evidence have been complied with. That being so the sixth plaintiff's evidence under the Evidence Act 1950, and despite being a bankrupt, is admissible.

[24] With the absence of any law that deems or states that a bankrupt's evidence is inadmissible without more we therefore answer the question for determination in the negative. The quality, relevancy or admissibility of a specific piece of evidence adduced by the bankrupt is a separate matter subject to the rules of evidence, to be decided by the presiding judge.

[18] The principles enunciated by the Court of Appeal in *Ranbaxy* and the Federal Court *Tong Soon Tiong & Ors v FA Securities Sdn Bhd* are very much applicable to the present case. The first appellant company, through its solicitor/counsel having conduct of the matter had called three witnesses, namely DW1, DW2 and DW3. Clearly, the solicitor in so doing was acting on the authority given to him by the first appellant, for it is the solicitor/counsel who has conduct of the matter and present the company's case in court. These

witnesses are for all intents and purposes the company's witnesses, and they were in court voluntarily. In this case, DW1 was an ex-director of the first appellant and was also the second defendant in the suit, DW2 was a director of Platinum Fitness, the company that had taken over the lease, management and operations of the gym from the first appellant, and DW3 was an ex-director of the first appellant during the material time. They all had relevant testimony to give in the trial, for all of them had close nexus with the parties, and had direct knowledge of the subject matter of the dispute between the parties. The respondent's pleadings also allude to this fact, in particular the second appellant (DW1) who is alleged by the respondent to be the mind and will of the first appellant at all material times.

[19] A party to an action may call witnesses to support its claim or counterclaim or to establish its defence of a claim in several ways. One way is to procure their voluntary attendance in court, and the other is to issue a subpoena to compel a witness to attend. When a person is subpoenaed as a witness, it can hardly be said that the person is authorised by the company to testify on its behalf, for he may be a reluctant witness. That person is summoned by the court via the subpoena and compelled to attend court and give relevant testimony at trial, which evidence may be useful to the court in determining the issues at hand. The subpoena is issued by the court in the name of the Yang Di Pertuan Agong to compel attendance in court. Such attendance is not merely a civic or public duty but a legal obligation, the disobedience of which attracts penal sanction.

[20] There is no requirement in law, nor does it not serve any useful or practical purpose, to require a person appearing as a witness for a company to be expressly authorised to do so by the company. When any witness appears to testify in court for and on behalf of a company, that person is in court because the company had called the witness to appear as a witness on its behalf. To that extent that person is termed the company's witness. It would be superfluous to require a further letter of authorisation or a resolution from the company. This would be mere surplusage which brings no benefit to the proceedings. These witnesses are no different from a witness called by a non-corporate individual litigant.

[21] In any event, in the present case, when DW1 was challenged by learned counsel for the respondent on his authority to appear as witness for the first appellant, DW1 had categorically stated that he was authorised by the General Manager of the first appellant with whom he had been discussing the suit. DW1 was thus giving evidence for himself as the second appellant/defendant in the action as well as for the first defendant. All three witnesses of the first appellant had direct knowledge of the matters in dispute and were relevant and competent witnesses.

[22] Thus, we find that the learned trial judge had clearly misdirected himself when he decided not once but twice to disregard the evidence of the first appellant's witnesses. The learned High Court judge in dismissing the first appellant's counterclaim once again misdirected himself when he said:

> The basis of the plaintiff's objection to the counterclaim is the same as argued earlier on in this case that the first defendant did not offer any witness to testify on behalf of the first defendant. Based on the said arguments, it was submitted that the counterclaim here was a non-starter. *As I have decided earlier in this judgment that the first defendant did not offer any witnesses to oppose the plaintiff's claim, similarly here I will take the same stance and on the said reasoning, I find the first defendant's counterclaim here ought to be disposed on the same grounds*. In the circumstances, I ruled that the counterclaim herein has not been proven. (Emphasis added.)

These findings by the trial judge have greatly prejudiced the first appellant. The evidence of DW1, DW2 and DW3 are clearly admissible in law as they are all competent witnesses. The law only requires the first appellant to call witnesses who are competent and whose testimony would be relevant. The facts of the case shows that DW1 and DW3 who were directors of the first appellant during the relevant period in dispute up to the takeover of the gym business by Platinum had personal knowledge regarding the agreement between the first appellant and respondent, and the ensuing dispute. DW2 became a director of the first appellant from the time when Platinum came into the picture by way of the sublease until the time when the respondent re-entered the demised premises and took possession of the gym and terminated the lease agreement. Hence, all three witnesses are relevant to the issues at hand and had remained credible under cross examination. Thus, we do not find any reason why the evidence of DW1, DW2 and DW3 ought to be rejected. They are principally witnesses of the court, whose testimony if relevant and admissible, assists the court in making its determination of the issues. In this regard we must be reminded of the well-established principle that 'there is no property in a witness'. See the judgments of the Federal Court in *Husdi v Public Prosecutor* [1979] 2 MLJ 304; [1979] 1 LNS 33; and *Suruhanjaya Sekuriti v Datuk Ishak bin Ismail* [2016] 1 MLJ 733; [2016] 3 CLJ 19. Therefore, the rejection of the evidence of these defence witnesses is a grave error on the part of the learned trial judge that warrants appellate intervention.

THE APPELLANT'S SECOND ISSUE

[23] The first appellant contends that the allowing of the respondent's claim by the High Court for RM56,884.20 in rental arrears, RM18,534.81 for outstanding electricity charges, RM2,632.96 for water bill arrears, and RM588,378.91 as loss and damage to the gym equipment was wrong as it is unsupported by evidence.

[24] In respect of the arrears of rental for the months of September and October 2017, the first appellant states that there is a valid set off. The lease agreement was for five years commencing from 1 August 2015 until 31 July 2020 at a monthly rental of RM46,060. It is common ground that the monthly rental of RM46,060 comprised two distinct parts, namely:

(a) the sum of RM26,060 as rental for the demised premises; and

(b) the sum of RM20,000 for the use of the gym equipment.

[25] Pursuant to cl 5 of the LOU, it was agreed that if the landlord were to reduce the monthly rental of RM26,060 payable by the respondent under the tenancy agreement, the first appellant shall be entitled to a refund of 70% of that reduction. There is undisputed evidence that the landlord did reduce the monthly rental for the demised premises from RM26,060 to RM21,484.40 from July 2016. Hence, there was a reduction of RM4,575.60 per month, of which the first appellant was entitled to 70%. Nevertheless, the first appellant paid the full monthly rental to the respondent. The first appellant states that from July 2016 to October 2017, its total entitlement for the 70% reduction would amount to RM68,634, which the respondent must refund to the first appellant. However, the respondent failed to do so.

[26] Hence, the first appellant submits that there is over payment of the monthly rental from July 2016 and the refund of this over payment due from the respondent amounting to RM68,634 is more than sufficient to set off the claim of RM56,884.20 in rental arrears for the months of September and October 2017. This in essence is also the first appellant's counterclaim.

[27] When the evidence is construed as a whole, we find merit in the first appellant's contention. The uncontroverted evidence, and in fact the documentary evidence adduced by the respondent themselves, shows that the first appellant is entitled to the set off of RM68,634 against the sum of RM56,884.20 claimed as rental arrears. Thus, we find that the learned trial judge had failed to properly evaluate the evidence when he allowed the respondent's claim for the sum RM56,884.20 as rental arrears. We find that by reason of this valid set off there were in fact no rental arrears due and payable to the respondent by the first appellant. Had there been proper judicial appreciation of the evidence, this would have been quite apparent. Thus, we find that this a proper case for appellate intervention to set aside this part of the judgment.

[28] As for the sum of RM18,534.81 for outstanding electricity charges and RM2,632.96 as arrears in the water bill that was allowed by the High Court, we find that there is ample evidence to support this claim by the respondent. There is documentary evidence in the form of outstanding bills from the respective

utilities companies that remains unpaid for the period where the first appellant was in occupation of the demised premises. Hence, we find no reason to interfere with this part of the judgment of the High Court.

[29] As for the sum of RM588,378.91 allowed by the High Court as loss and damage to the gym equipment, the learned trial judge in his grounds of judgment stated as follows:

> The next issue for determination here is the plaintiff's claim for loss and damages of the equipment as a result of the breach of the lease agreement. *In support of the claim, the plaintiff relied on the testimony of its witnesses and also the fixed asset list that was exhibited. Based on the exhibit, it was submitted that the first defendant was liable.*
>
> In response the first defendant relied on the arguments that the agreement had been vitiated by the misrepresentation of the plaintiff as the equipment in issue was not the plaintiff's equipment but was merely leased from another company ie Excel Fitness. In short, it is not the plaintiff's equipment. In support the defendant relied on the evidence adduced in the cross-examination of PW1 to support its arguments on this point.
>
> In response to this issue, the plaintiff relied on its earlier arguments that in this case, the first defendant had not offered any evidence in the trial as it had failed to call any witness to testify on its claim in this case. It was further submitted in the circumstances, the issue raised in the submission on this point was merely arguments from the Bar and ought to be rejected. It was submitted that as this point was not proven, the court ought to decide the issue in favour of the plaintiff as it had proved that the equipment in issue were unusable and no longer fit for its purpose after the first defendant had breached the lease agreement. In respect of this issue, I find there are merits in the plaintiff's arguments. The defence raised is one of misrepresentation which is a serious challenge as it affects the validity of the agreement if proven. In order to prove such a defence, the first defendant ought to present sufficient evidence to prove on the balance of probability that it was misrepresented by the plaintiff on this issue. Based on the evidence adduced in the trial, the burden is not discharged by merely relying on some parts of the evidence of PW1 and DW1. The evidence of these witnesses, even if it shows that the equipment belonged to another company would not be sufficient to show the element of misrepresentation to vitiate the agreement as contended by the first defendant. In the present case, the lease agreement had also clearly stated that the first defendant is bound by cl 5(c).
>
> On this issue, based on the clear provisions of the lease agreement and the oral evidence of PW1 and the exhibits produced by the plaintiff, it is my finding that the plaintiff has proved on the balance of probabilities that it is entitled to recover the loss and damages for the equipment as claimed.

[30] Now, we find that the only evidence adduced in support of this head of claim is the Condition Report found at pp 399–406 of the record of appeal (Vol 2). The learned trial judge had also referred to this document in his grounds of judgment as the 'Fixed Assets List'. Though this document was placed as a Part B document in the Bundle of Documents at trial, the first

appellant disputed the contents thereof and hence it was incumbent upon the respondent to prove the alleged loss and damage.

[31] When scrutinised, the Condition Report (or the fixed assets list as the learned trial judge calls it) seems to be a tabulation of the depreciation of the assets in that list at the rate of 15% percent per annum over several years together with a table of summary of the alleged condition of some of the gym equipment after termination of the lease agreement when they were repossessed by the respondent. There are some values attached to these items by the respondent. The respondent's claim for the loss of value of these gym equipment was singularly based on this document. PW1 was cross-examined on this Condition Report/Fixed Assets List, he confirmed that the document was not prepared by him. He testified that the Condition Report was prepared by his accountant/auditor. He did not have any direct knowledge of the contents of the document. When further queried by counsel for the first appellant, PW1 had this to say:

> Q44: PUT: Do you agree with me that there is no reference made in any part of the document (pages 79–86) recording or showing that it was prepared by your accountant auditor?
>
> A: I am not sure because I asked the office to do for me.

[32] At best the evidence is that the Condition Report was prepared by someone in the respondent's office, and we are not sure who it was. In fact PW1 did not give the name of the maker of the document. Neither did PW1 have direct knowledge of the contents of the Condition Report. In the circumstance, we would have to agree with submissions of learned counsel for the appellants that the evidence of PW1 based on the Condition Report is hearsay and inadmissible. The learned trial judge seems not to have given proper and due consideration to this important issue of admissibility.

[33] It is trite law that the respondent bears the burden of proof to establish the damages that it says that it has suffered. See: *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360; [1990] 2 CLJ Rep 635. The burden of proof rests throughout the trial on the party who asserts that the facts exist (see: s 101 of the Evidence Act 1950 and the judgment of the Federal Court in *Hong Yik Trading v Liziz Plantation Sdn Bhd* [2017] 5 MLJ 398; [2017] 8 CLJ 491). Hence, it would be incumbent upon the respondent to adduce sufficient evidence of the loss and damage to the gym equipment and how the value of the loss was ascertained.

[34] In this case, we find that the respondent has failed to discharge that burden on a balance of probabilities. There is no credible evidence establishing the nature of loss and damage to the gym equipment. There is no evidence showing that any of the witnesses had inspected the equipment and found

them to be in a state of disrepair. Neither is there any credible evidence showing how the valuation as to the alleged loss or diminution in value to the itemised equipment in the Condition Report was arrived at. PW1 did not give any direct evidence from his personal knowledge in support of the respondent's claim for the sum of RM588,378.91. The court cannot rely on a document containing a summary of claim made by hitherto unknown person as sufficient evidence of loss suffered by the respondent.

[35] Thus, we find that the pronouncement by the learned judge that the respondent had 'proved on the balance of probabilities that it is entitled to recover the loss and damages for the equipment as claimed' is misconceived in law, and in fact, for there is hardly any evidence to support this claim. Therefore, we allowed this part of the appeal by the first appellant and set aside the award of the sum of RM588,378.91.

THE APPELLANT'S THIRD ISSUE

[36] The third issue is whether the second defendant is guarantor for the payment of the monthly rentals and the guaranteed rental income in the event of default by the first defendant. The respondent's pleaded case is that the second defendant was at all material times a director and shareholder of the first appellant and that it was at the request of the second appellant that the respondent had entered into the lease agreement with the first appellant. In the amended statement of claim, the respondent states:

> 4.1 *It was the express and/or implied condition of the Lease Agreement that the second Defendant, being the mind and will of the first Defendant, held himself out as guarantor for the due performance and observance by the first Defendant of all the covenants and obligations on its part to be performed under the Lease Agreement* and to keep the Plaintiff indemnified against all loses and damages incurred and/or suffered or to be incurred and/or suffered by the Plaintiff arising out of any breach, non-observance or non-performance by the first Defendant of its covenants and obligations under the Lease Agreement [Clause 3(n)].
>
> 4.2 Furthermore by Clause 5(l) of the Lease Agreement it was expressly agreed that the monthly rental during the term of the lease and the guaranteed rental income as agreed under the Lease Agreement are personally guaranteed by Mr Nicholas Ng Fui Ming (NRIC No. 811119–12–5249 of No. 49, Reservoir Garden Phase II, 88200 Penampang, Sabah, Malaysia.

The respondent's pleaded case is that the second appellant had impliedly or expressly guaranteed 'the due performance and observance by the first defendant of all the covenants and obligations on its part to be performed under the lease agreement'. It was on the basis of this pleaded case that the respondent's claim for relief against the second appellant mirrored that against the first appellant.

[37] The second appellant denied the respondent's allegation of implied or express guarantee and stated that his role in the lease agreement was to merely sign the agreement for the first appellant as a director then, and other than that he was not a party to the lease agreement. A scrutiny of the document shows that the parties to the lease agreement were only the respondent and the first appellant. According to the second appellant, this fact is apparent from the wordings at the beginning of the lease agreement where it states: 'IT IS AGREED BETWEEN THE PARTIES HERETO THAT ...', which is clearly indicative of the fact that it was an agreement purely between respondent and the first appellant, who were the only named contracting parties. The second appellant submits that he has no privity of contract with the respondent and that cl 5(l) of the lease agreement is not binding on him as a non-party to the agreement.

[38] The second appellant further states that he had never signed any documents with the respondent wherein he specifically gave his personal guarantee for the first appellant's performance of the contract as alleged by the respondent. In addition, the second appellant contends that there is no evidence showing that he was the mind and will of the first appellant. He asserts that the evidence in fact shows the contrary, that is the second appellant was only a minority shareholder (40%) and that there were other shareholders and directors in the first appellant company. The second appellant had subsequently sold off his entire shareholding and resigned as director of the first appellant in July 2016. And shortly thereafter the respondent dealt with Platinum in respect of the lease agreement.

[39] However, the learned trial judge in his grounds of judgment found that the guarantee stated in cl 5(l) of the lease agreement between the respondent and the first appellant was binding on the second appellant to create a personal guarantee. This is what the learned judge said in his grounds of judgment:

> In my view the terms in the clause is clear and unambiguous. It is clearly stated that the second defendant had agreed that he would personally stand as the guarantor for the first defendant.
>
> Although the second defendant denied and claimed that he was not providing a personal guarantee to the first defendant, he was not able to provide or introduce any probable evidence to suggest that he has taken steps to dispute or contradict the intention as stated in cl 5(l) above. His denial at this stage without more, to my mind is merely an afterthought to deny liability as a personal guarantor to the first defendant.
>
> In this regard to this issue, I am more inclined to accept the evidence of PW1 which I think is more probable in the circumstances when he stated that the second defendant was the mind and will of the first defendant and he would not have agreed to enter the lease agreement with the first defendant if the second defendant had not agreed to be personally responsible for the operation of the gym and agreed to stand as guarantor.

[40] We find that the learned judged had erred in making that determination. Firstly, even if the PW1 had agreed for the respondent to enter into the lease agreement on the basis of the second appellant having agreed to stand as guarantor for the payment of the monthly rental, there is no document evidencing the actual terms of the guarantee between the respondent and the second appellant. In this regard we agree with learned counsel for the appellants that the second appellant, who is not a party to the lease agreement, though he may have executed it on behalf of the first appellant as its then director, he cannot be personally held to be bound by the terms of the lease agreement. We are of the view that there is still a requirement for a separate letter of guarantee to be executed by the second appellant in favour of the respondent spelling out the terms and scope of the guarantee. There is none here.

[41] Secondly, even if cl 5(l) of the lease agreement is said to bind the second appellant, the respondent would have to first establish breach of the lease agreement occasioned by the non-payment of the monthly rental by the first appellant for the second appellant's liability as guarantor to arise. However, by virtue of our earlier finding that there were no arrears in the monthly rental due and payable, there is no breach by the first appellant in this regard, and as such liability under cl 5(l) does not arise, and has not been established. In the circumstance, we are of the view that cl 5(l) is inoperative against the second appellant. In light of this, we find that the learned trial judge had erred in law and in fact by ordering the second appellant to pay the sum of RM56,884.20 to the respondent. Hence, we allow the appeal against this part of the judgment and set aside the High Court's order in that respect.

THE APPELLANT'S FOURTH ISSUE

[42] This issue concerns the dismissal of the first appellant's counterclaim for the refund of the 70% entitlement in the rental reduction by the landlord. We have covered this issue earlier when discussing the first issue. The learned judge in dismissing the counterclaim had once again erroneously held that there were no evidence to support the first appellant's counterclaim. This erroneous finding was made by the learned trial judge after erroneously disregarding the evidence of the three defence witnesses. Now, for the same reasons discussed earlier, when the testimony of these three witnesses are considered, we find that there is ample evidence to prove the first appellant's counterclaim. There is evidence of the reduction of the monthly rental by the landlord given to the respondent. This evidence is uncontroverted and is in fact found in the documents tendered by the respondent themselves. Under the terms of the lease agreement the first appellant was entitled to 70% of the said reduction. Hence, there is overwhelming evidence establishing the first appellant's counterclaim. The learned judge was clearly wrong in dismissing the counterclaim.

[43] The first appellant claims the sum of RM68,634 in the counterclaim, which after the set off of RM56,884.20 for the September and October 2017 rental arrears, the amount that the first appellant would still be entitled is RM11,749.80. Thus, we set aside the High Court's dismissal of the counterclaim and substitute it with judgment for the first appellant in the sum of RM11,749.80 together with interest at 5% from the date of the counterclaim.

THE RESPONDENT'S ISSUES IN THE CROSS-APPEAL

[44] The respondent's cross-appeal relates to the dismissal by the High Court of these three heads of claim:

(a) the claim for the sum of RM138,180 being payment in lieu of the three months' notice of termination;

(b) the claim for the sum of RM414,540 being the nine months guaranteed rental income stipulated in the lease agreement; and

(c) the High Court's rejection of the respondent's claim in the sum of RM1,519,998 for loss of rentals from 1 November 2017 to 31 July 2020.

[45] The learned judge in his grounds of judgment has quite comprehensively dealt with these heads of claims. In respect of the claim for the sum of RM138,180 being the payment in lieu of the three months' notice of termination and the sum of RM414,540 as the nine months guaranteed rental income, the respondent had relied on the provisions of cla 5(k) of the lease agreement which provides that in the event that the first appellant wishes to terminate the agreement before the expiry of the same, the first appellant is required to give three months' notice and is also required to pay nine months of monthly rental as guaranteed rental income.

[46] The operative words in cl 5(k) are:

> The *Lessee shall be entitled to terminate this Agreement* before the expiry of the lease by giving three (3) months prior notice in writing to the Lessor of its intention and by paying the Lessor a sum equal to nine (9) months of the monthly rental (hereinafter referred to as 'the guaranteed rental income') as agreed liquidated damages ...

The learned trial judge rejected both these heads of claims and we agree with that decision but for reasons other than those stated in the grounds of judgment. Firstly, for cl 5(k) of the lease agreement to apply there must be premature termination by the first appellant. Here, the lease agreement was not terminated by the first appellant, instead it was the respondent who terminated the lease agreement by re-entering and taking possession of the demised

premises. And subsequently confirming the termination by issuing the termination letter dated 6 November 2017. Hence, the provisions in cl 5(k) of the lease agreement does not come into play.

[47] Further, ten days later, ie on 16 November 2017, the landlord terminated the tenancy agreement with the respondent for reasons of the respondent's breach of that agreement; which meant that even if the lease agreement were still valid and subsisting, it too would have come to an automatic end, as the life of the lease agreement was dependent upon the life and existence of the main tenancy agreement between the landlord and the respondent. Hence, the respondent could not have suffered any damages as claimed for any period after the termination of tenancy agreement by the landlord. To that extent, we find that we are in agreement with the learned trial judge that to allow these two heads of claim would amount to unreasonable and unwarranted compensation being awarded to the respondent.

[48] As for the claim for the loss of rental in the sum of RM1,519,998 from 1 November 2017 to 31 July 2020, the learned judge had this to say:

> In respect of this claim, the short answer is that there is no basis for this Court to consider this claim as the Landlord had terminated the Tenancy Agreement with the Plaintiff on 16.11.2017. With the termination of the agreement with the Landlord, the Plaintiff's Lease Agreement with the first Defendant also came to an end. In the circumstances, the Plaintiff's claim for the loss of rental therefore has not basis.

The uncontroverted evidence shows that the respondent's tenancy agreement with the landlord was terminated by the landlord as of 16 November 2017 for reasons of non-payment of monthly rentals. Following the termination the respondent was no longer in possession of the demised premises. Hence, we find the learned trial judge was entirely correct in rejecting this claim as the respondent no longer had legal possession of the demised premises to rent it out to the first appellant, and to have suffered the loss of rental income for the remaining period of the lease agreement from 1 November 2017 to 31 July 2020.

CONCLUSION

[49] By reason of the foregoing, we allowed the appellants' appeal in part and dismissed the respondent's cross-appeal. The order of the High Court was varied to the extent of our judgment as stated above and we made the following orders:

(a) the first appellant's appeal is allowed in part:

  (i) the first appellant's appeal against judgment for rental arrears of RM56,884.20 and damage and loss to gym equipment of RM588,378.91 is allowed. The High Court judgment against the

first appellant for rental arrears of RM56,884.20 and damage and loss to gym equipment of RM588,378.91 is set aside;

(ii) the first appellant's appeal against judgment for outstanding electricity bill of RM18,534.81 and water bill of RM2,632.96 is dismissed. The High Court judgment against the first Appellant for outstanding electricity bill of RM18,534.81 and water bill of RM2,632.96 is affirmed; and

(iii) the first appellant's appeal against the dismissal of its counterclaim is allowed. The High Court's dismissal of the counterclaim is set aside and substituted with judgment for the first Appellant in the sum of RM11,749.80 together with interest at 5% from the date of the counterclaim.

(b) the second appellant's appeal is allowed. The High Court judgment against the second appellant for the sum of RM56,884.20 is set aside;

(c) the respondent's cross-appeal is dismissed;

(d) the order of costs made by the High Court is set aside; and

(e) there shall be no order of costs here and below. Each party to bear their own costs.

Appellants' appeal allowed in part; respondent's cross-appeal dismissed; order of High Court varied with no order as to costs.

Reported by Dzulqarnain Ab Fatar